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COLANTUONO
HIGHSMITH
WHATLEY, PC

MICHAEL G. COLANTUONO | (530) 432-7359 | MCOLANTUONO@CHWLAW.US

Our File No. 10000.0191

November 29, 2021

BY ELECTRONIC FILING

Chief Justice Cantil-Sakauye and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Sierra Watch v. Placer County* (Case No. C087892) — Request for Depublication

Honorable Justices:

Introduction. I write on behalf of the League of California Cities pursuant to rule 8.1125 of the California Rules of Court to request depublication of *Sierra Watch v. Placer County* (2021) 69 Cal.App.5th 1 (*Sierra Watch*).

Interest of the League of California Cities. The League of California Cities ("Cal Cities") is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents and enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State, which monitors litigation of concern to municipalities and identifies cases of statewide or nationwide significance. The Committee has identified this as such a case. Cal Cities and its member cities have a substantial interest in this case because it construes the Ralph M. Brown Act, which governs the meetings of every city's City Council and other boards, commissions and committees, and has significant implications for the mechanics of local democracy.

Discussion. The published portion of this opinion concerns the Brown Act's requirement that writings distributed — by anyone — to members of a local legislative body less than 72 hours before a meeting (i.e., after the agenda is posted) also be made

"available for public inspection … at the time the writing is distributed … ." (Gov't Code, § 54957.5, subd. (b)(1) ["Section 54957.5"].) *Sierra Watch* held that even when a writing is distributed outside business hours, local agencies must make it available to the public in hard copy at that time. (*Id*. at p. 10.)

The appellate court accepted that its holding would require local agencies to keep an office open to the public during evenings and/or weekends when a writing is distributed to a local agency's legislative body during those times or to withhold late-breaking information (to the extent the agency can control this) from the Board until an office is open. Further, the court observed this rule could enable delaying tactics — a legislative concern in CEQA cases such as this — and may also "require counties to delay when they distribute material to their board members." (*Id*. at pp. 12–13; see also Gov. Code, § 54957.5, subds. (a), (e) [statute not to be read to delay public access to information]; cf. *Save Lafayette Trees v. East Bay Regional Park District* (2021) 66 Cal.5th 21, 280 Cal.Rptr.3d 679, 691 [short CEQA statute of limitations reflects legislative concern with delay].) The court's concerns were well-founded. In addition, the court's interpretation would be unworkable for many government offices that are open for only limited hours due to COVID-19. For these reasons, we ask this Court to depublish *Sierra Watch*.

This case concerns claims that Placer County approved land use entitlements in violation of Section 54957.5. (*Sierra Watch, supra*, 69 Cal.App.5th at p. 4.) The statute provides in pertinent part:

> (a) … [A]gendas of public meetings and any other writings, when distributed to all, or a majority of all, of the members of a local agency by any person in connection with a matter subject to discussion or consideration at an open meeting of the body, are disclosable public records under the California Public Records Act … and shall be made available upon request without delay. …

Under subdivision (b)(1),

> If a writing that is a public record … and that relates to an agenda item for an open session of a regular meeting of the legislative body of a local agency, is distributed less than 72 hours prior to that meeting, the writing shall be made available for public inspection pursuant to paragraph (2) at the time the writing is distributed to all, or a majority of all, the members of the body.

Note that the use of the passive voice applies this rule whether an agency's staff provides information to a quorum of a legislative body, or a member of the public does. Under paragraph (2) of subdivision (b),

> A local agency shall make any writing described in paragraph (1) available for public inspection at a public office or location that the agency shall designate for this purpose. … The local agency also may post the writing on the local agency's Internet Web site in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming meeting.

In *Sierra Watch*, the Placer County Board of Supervisors posted a meeting agenda in advance of a meeting, noting the Board would consider an ordinance to approve a development agreement for a controversial Tahoe-area resort. (*Sierra Watch, supra*, 69 Cal.App.5th at p. 6.) At 5:36 p.m. the day before the meeting, County Counsel emailed the County Clerk an updated draft of the agreement, and a memorandum explaining the change. (*Id* at p. 7.) The County Clerk emailed the documents to all board members and promptly made copies publicly available in her office. (*Ibid*.) But that office had closed to the public at 5:00 p.m., to reopen the next morning at 8:00 a.m. (*Ibid*.) The following day, the Board held its meeting, at which it approved the agreement. (*Ibid*.)

Sierra Watch petitioned for writ of mandate and sued for injunctive and declaratory relief alleging the County violated Section 54957.5 because it failed to make County Counsel's memorandum available for public inspection when it was distributed to the Board. (*Sierra Watch, supra*, 69 Cal.App.5th at p. 8.) Sierra Watch argued that placing a document in the clerk's office after hours meant the writing was only "available for public inspection" when the office reopened. (*Id*. at p. 10.) The trial court rejected this contention, finding the County made the memorandum available for public inspection the moment the County Clerk placed it in her office even though it was then closed. (*Id*. at p. 9.) Sierra Watch appealed. (*Ibid*.)

The Court of Appeal adopted Sierra Watch's reading of Section 54957.5. (*Sierra Watch, supra*, 69 Cal.App.5th at p. 10.) The court further read the statute to disallow local governments to post writings to their websites as an alternative to making hard copy available at an office. (*Id*. at p. 12.) Instead, the court held that agencies cannot satisfy Section 54957.5 "merely by posting materials online," but are required to make hard copies available at a physical location. (*Ibid*.) The court noted that committee analysis of the bill enacting Section 54957.5 interpreted it to allow agencies to alternatively post writings on the internet but rejected that interpretation. (*Ibid*. [noting Senate Rules Committee's Analysis interpreting Section 54957.5 to require a local agency to " 'do either

of the following' ": (1) " '[m]ake the writing available at' " a physical location, or (2) " '[p]ost the writing on the local agency's Internet Web site.' "].)

The court acknowledged its reading of Section 54957.5 could lead to two negative consequences. First, because "counties cannot satisfy section 54957.5's subdivision (b) merely by posting materials online," "accepting Sierra Watch's position may at times require counties to delay when they distribute materials to their board members," leaving boards less time to consider late submissions. (*Sierra Watch, supra*, 69 Cal.App.5th at p. 12.) Second, this reading could "allow opponents to perpetually delay project approval by submitting last minute comments outside of normal business hours." (*Id*. at p. 13.) For example, if a person emailed all board members comments concerning an item on the board's agenda in the middle of the night before every meeting, "unless the county staffs its office around the clock" the County cannot assure that writing is made available to the public as Section 54957.5 requires without delaying the meeting. (*Id*. at p. 13.)

In short, the court identified two mischiefs its interpretation of Section 54957.5 causes: first, local agencies may be forced to delay sharing writings with their boards (if they can — activists can email legislators directly in many places) until a government office is open; and second, to comply with the statute would at times require a local agency to "staff[] its office around the clock" — perhaps only on contentious projects, but an unrealistic burden, nonetheless. The court found that the first concern was not "so absurd" as to justify overriding the plain meaning of the statute, and the second concern was not directly raised by the facts at hand. (*Sierra Watch, supra*, 69 Cal.App.5th at pp. 12–13.)

However, it will arise soon enough — the Brown Act applies to each of California's thousands of local governments. Moreover, this reading has the tail wagging the dog. A statute aimed at public information is read to require Board members be kept in the dark or meetings delayed. Experience teaches that most who engage with government do so electronically when possible, especially during the pandemic. Are we to believe Sierra Watch's counsel was disadvantaged here because they could not drive from their San Francisco offices to Auburn to inspect a memorandum posted to the County's website?

The Court of Appeal did not write this opinion with intent to publish. Appellant and other CEQA plaintiff's counsel sought publication, which the court granted in part.

Sierra Watch misreads Section 54957.5. As the Court of Appeal acknowledged, its reading of Section 54957.5 creates a rule agencies cannot satisfy as to writings distributed other than by their own staff. When a writing is distributed to members of a local

legislative body for a meeting for which the agenda has been posted, it must make that writing available to the public in hard copy whether at midnight on a Monday or noon on Saturday, or withhold it from the legislators. The agency must do so even when it cannot control when such a writing is distributed. As *Sierra Watch* posits, "[s]uppose that in the middle of the night before every meeting, a member of the public e-mails all board members comments concerning an item on the board's agenda"? (*Sierra Watch, supra*, 69 Cal.App.5th at p. 13.) Under this scenario, anyone could cause a county to violate section 54957.5 by sending agenda material to board members after county offices close for the day. Surely, County Counsel is not the only lawyer at work at 5:36 p.m.

Local agencies may be forced to delay meetings when written materials are emailed to board members the night before meetings. Otherwise, a litigant may claim an agency violated Section 54957.5 by proceeding with a meeting. As many government offices have reduced hours of public access due to the pandemic, the problem will be especially acute until the virus relents.

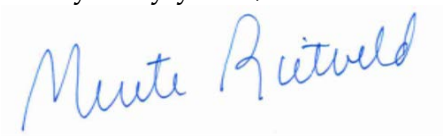
To the extent *Sierra Watch*'s reading is viewed as literal, statutes should be interpreted to avoid "absurd" consequences the Legislature did not intend. (E.g., *Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 490 ["[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend."] [cleaned up].) However, a plain, commonsense reading of Section 54957.5 allows a more sensible result, consonant with the legislative purposes of public access and avoiding needless delay. (*Ibid*. ["words of the statute should be given their ordinary and usual meaning"].) Section 54957.5 requires a local agency to make writings connected to agendas for upcoming open meetings "available for public inspection at a public office" without specifying the agency must do so outside business hours. (Gov. Code, § 54957.5, subd. (b)(2).) The point of the deadline is to avoid government foot-dragging (which the Court of Appeal may have feared here), not to require offices to open overnight or to create a tactic for delay.

Under *Sierra Watch*'s interpretation, a local agency would comply with Section 54957.5 if it places a document in its clerk's office a minute before closing on a Friday, but violate it by placing it there two minutes later. But meaningful public access will be the same either way — soft copy will be available when the document is posted to the web and hard copy will not be available until Monday morning. Reading Section 54957.5 to allow local agencies to "make records available at a physical location **or alternatively** post the records online" avoids this absurd result. (*Sierra Watch, supr*a, 69 Cal.App.5th at p. 12 citing Senate Rules Committee's Analysis supporting this reading.)

Conclusion. Depublication is warranted because *Sierra Watch* adopts a needlessly literal interpretation of the Brown Act that imposes a rule local agencies cannot satisfy, invites tactical delay, and does not advance meaningful public access to government information. It suggests that staffing offices "around the clock" is the only way a local agency can satisfy Section 54957.5. (*Sierra Watch*, *supra*, 69 Cal.App.5th at p. 12.) One rather doubts the Legislature had this in mind. (Cf. Cal. Const., art. XIII B, § 6 [state must fund mandates on local government].) *Sierra Watch*'s reading does not reflect the statute's plain meaning, and even if it did, the statute can — and therefore should — be interpreted to avoid these absurd consequences.

Accordingly, Cal Cities respectfully urges this Court to depublish *Sierra Watch*.

Very truly yours,



Michael G. Colantuono
SBN 143551
Merete E. Rietveld
SBN 252069

MGC:mgc

c: Corrie Manning, General Counsel, League of California Cities

Enclosure: Proof of Service

PROOF OF SERVICE

Sierra Watch v. Placer County et al.
Placer County Superior Court Case No. SCV0038917
California Court of Appeal, Third District Case No. C087892

I, McCall Williams, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 790 East Colorado Blvd., Suite 850, Pasadena, CA 91101. On November 29, 2021, I served the document(s) described as **REQUEST FOR DEPUBLICATION** on the interested parties in this action addressed as follows:

Amy J. Bricker amy_bricker@yahoo.com Robert S. Perlmutter perlmutter@smwlaw.com Laura D. Beaton Shute Mihaly & Weinberger 396 Hayes St. San Francisco, CA 94102	*Attorneys for Plaintiff and Appellant*
Clayton T Cook ccook@placer.ca.gov Placer County Counsel 175 Fulweiler Ave Auburn, CA 95603	*Attorneys for Defendants and Respondents Placer County and Placer County Board of Supervisors*
Whitman Fortescue Manley wmanley@rmmenvirolaw.com Howard F. Wilkins III cwilkins@rmmenvirolaw.com Nathan O. George ngeorge@rmmenvirolaw.com Remy Moose Manley LLP 555 Capitol Mall, Suite 800 Sacramento, CA 95814	*Attorneys for Real Parties in Interest and Respondents Squaw Valley Real Estate, LLC, and Squaw Valley Resort, LLC*

Hon. Michael Jones
PLACER COUNTY SUPERIOR COURT
Department 42
10820 Justice Center Drive,
Roseville CA 95678

California Court of Appeal
THIRD APPELLATE DISTRICT
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

☒ **BY ELECTRONIC SERVICE**: On November 29, 2021, I instituted service of the above listed document by submitting an electronic version of the document via file transfer protocol through the upload feature at www.tf3.truefiling.com, to the parties who have registered to receive notifications of service of documents in this case as required by the Court. Upon completion of the transmission of said document, a confirmation of receipt is issued to the filing/serving party confirming receipt from info@truefiling.com for TrueFiling.

☒ **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Pasadena, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 29, 2021, at Pasadena, California.

McCall Williams